

# **Exhibit 40**

1 F. Bartolotta

2 UNITED STATES BANKRUPTCY COURT

3 SOUTHERN DISTRICT OF NEW YORK

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6 -----x

IN RE:

7  
8 LEHMAN BROTHERS HOLDINGS, Chapter 11  
9 INC., et al., Case No. 08-13555 (SCC)  
10 Debtors.  
11

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15 VIDEOTAPED DEPOSITION OF FRANK BARTOLOTTA  
16 New York, New York  
17 Wednesday, May 7, 2014  
18  
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22

23 Reported by:

24 THOMAS A. FERNICOLA, RPR

25 JOB NO. 73217

1 F. Bartolotta

2  
3  
4  
5  
6 May 7, 2014

7 2:04 p.m.

8  
9 Videotaped Deposition of FRANK

10 BARTOLOTTA, held at the Law offices of Patterson  
11 Belknap Webb & Tyler, LLP, 1133 Avenue of the  
12 Americas, New York, New York, before Thomas A.  
13 Fernicola, a Registered Professional Reporter  
14 and Notary Public of the State of New York.  
15  
16  
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22  
23  
24  
25

1 F. Bartolotta

2 A P P E A R A N C E S:

3  
4 WEIL GOTSHAL & MANGES

5 Attorneys for Lehman parties

6 1300 Eye Street NW

7 Washington, D.C. 20005

8 BY: PETER ISAKOFF, ESQ.

9  
10 ARIELLE GORDON, ESQ.

11  
12  
13 SULLIVAN & CROMWELL

14 Attorneys for Canary Wharf parties

15 125 Broad Street

16 New York, New York 10004

17 BY: DAVID TULCHIN, ESQ.

18 JOHN MCCARTHY, ESQ.

1 F. Bartolotta

2 APPEARANCES (Continued):

3  
4 PATTERSON BELKNAP WEBB & TYLER

5 Attorneys for the Witness

6 1133 Avenue of the Americas

7 New York, New York 10036

8 BY: JAMES MASELLA, ESQ.

9 SHEKAR KRISHNAN, ESQ.

10  
11  
12  
13  
14  
15  
16  
17  
18 ALSO PRESENT:

19 MANUEL GARCIA, Videographer

20 BRIJESH P. DAVE, Lehman Brothers Holdings

21 RICHARD KATZ, Lehman Brothers Holding.

1 F. Bartolotta

2 THE VIDEOGRAPHER: This is the start  
3 tape labeled No. 1 of the videotaped  
4 deposition of Frank Bartolotta, in the  
5 matter of In Re: Lehman Brothers, on  
6 May 7, 2014 at approximately the 2:04 p.m.

7 My name is Manuel Garcia from TSG  
8 Reporting, Inc. I am the legal video  
9 specialist.

10 The court reporter is Tom Fernicola,  
11 in association with TSG Reporting.

12 Will counsel please introduce  
13 yourself.

14 MR. ISAKOFF: This is Peter Isakoff  
15 and Arielle Gordon of Weil, Gotshal &  
16 Manges, LLP, Lehman Brothers Holdings, Inc.

17 MR. TULCHIN: David Tulchin and John  
18 McCarthy from Sullivan & Cromwell, LLP, for  
19 the Canary Wharf parties.

20 MR. MASELLA: James Masella and  
21 Shekar Krishnan from Patterson Belknap  
22 Webb & Tyler, LLP, on behalf of the  
23 witness.

24 THE VIDEOGRAPHER: Will the court  
25 reporter please swear in the witness.

1 F. Bartolotta

2 F R A N K B A R T O L O T T A,

3 called as a witness, having been duly sworn

4 by a Notary Public, was examined and

5 testified as follows:

6 BY THE REPORTER:

7 Q. Please state your full name and  
8 address for the record.

9 A. Frank Bartolotta, 5019 Rustic Oaks  
10 Circle, Naples, Florida 34105.

11  
12 EXAMINATION BY MR. ISAKOFF:

13 Q. Mr. Bartolotta, how are you currently  
14 employed?

15 A. I'm employed as a consultant by  
16 Morgan Stanley.

17 Q. Have you ever had your deposition  
18 taken before?

19 A. No.

20 Q. Okay.

21 Just to go over a couple of the  
22 ground rules. Obviously, we have a court  
23 reporter and a videographer taking down  
24 everything verbatim, so we should try not to  
25 talk at the same time so there's a clear

1 F. Bartolotta

2 record.

3 If there's anything you don't  
4 understand about a question, please let me know  
5 and I'll do my best to clarify it.

6 If you need a break at any time,  
7 that's fine. You can consult with your counsel  
8 but not while a question is pending.

9 A. Okay.

10 Q. Do you have any questions before we  
11 proceed?

12 A. No.

13 Q. We have never met before; correct?

14 A. No, we have spoken on the phone but  
15 never met.

16 Q. We have.

17 What, if anything, did you do to  
18 prepare to testify here today?

19 A. Not much. Just talked to my attorney  
20 about how to answer the questions truthfully  
21 and directly.

22 Q. Okay.

23 Did you review the affidavit that was  
24 recently filed?

25 A. Yes, I did.



1 F. Bartolotta

2 Q. Okay.

3 Did you review anything else?

4 A. No. I looked back at the document,  
5 the document that was in question that was sent  
6 to me and that's it.

7 Q. What document is that?

8 A. The indemnity agreement that was in  
9 the lease.

10 Q. You're talking about Schedule 4 to  
11 the lease?

12 A. Yes. Yes.

13 Q. Okay. All right.

14 And could you just briefly sketch  
15 your educational background.

16 A. Yes.

17 I went to Fordham Law School, and  
18 after graduating from Williams College and  
19 taught school for a brief period of time.

20 Joined White & Case in 1978. Left  
21 White & Case in 1984 to join Morgan Stanley  
22 Realty.

23 I left Morgan Stanley Realty after  
24 being transferred to London. I left London in  
25 1995 to join Credit Suisse back in New York.

1 F. Bartolotta

2 And then I left Credit Suisse in 2000  
3 to join Lehman Brothers in London.

4 Returned to New York with Lehman  
5 Brothers in 2004.

6 Retired, left Lehman Brothers as an  
7 employee in 2006, and worked for Lehman  
8 Brothers as a consultant from 2006 until just  
9 before the bankruptcy. And then returned to  
10 work for Lehman in the bankruptcy in January of  
11 2009, and worked for Lehman as a consultant up  
12 to August of 2012, and then joined Morgan  
13 Stanley as a consultant in May of 2013.

14 Q. All right. Thank you very much.

15 What kind of law did you practice at  
16 White & Case?

17 A. Real estate.

18 Q. How did you come to give an affidavit  
19 this last March?

20 A. I was called by Mr. Iacobescu who  
21 asked if I would speak to his attorneys about  
22 the litigation. I said I would. They called  
23 me. They asked me questions about what  
24 happened during the negotiations and my role in  
25 it, and asked me if I would be willing to sign

1 F. Bartolotta

2 an affidavit based upon the discussions that we  
3 had over the phone.

4 Q. When was your conversation with  
5 Mr. Iacobescu that you just referred to?

6 A. It would have been some time mid  
7 March.

8 Q. Did he call you or did you call him?

9 A. I think he called me.

10 Q. And what -- how long did this  
11 conversation last?

12 A. My recollection it was very short.  
13 He just asked me if I would speak to his  
14 attorneys.

15 Q. Okay.

16 Was anybody else on the phone?

17 A. No, not to my knowledge.

18 Q. Did he tell you what he wanted you to  
19 speak to his attorneys about?

20 A. No. I knew it was in regard to  
21 litigation, but he didn't say specifically  
22 what.

23 Q. Okay.

24 Did you let anybody from Lehman know  
25 or any representative of Lehman know that you

1 F. Bartolotta

2 had been approached --

3 A. No.

4 Q. -- with this request?

5 A. No.

6 Q. Let's make sure I just finish the  
7 question just for the clear record. Okay.

8 Was there anything else that you can  
9 recall about your conversation with  
10 Mr. Iacobescu?

11 A. I had a couple of conversations with  
12 him, but that was the one in which he asked me  
13 to talk to his attorneys.

14 Q. Okay.

15 Did you have any other conversations  
16 with Mr. Iacobescu in and about March of this  
17 year --

18 A. No.

19 Q. Hold on a second. Let me finish the  
20 question -- relating at all to the it care  
21 would have claims against Lehman Brothers  
22 Holdings, Inc.?

23 A. Yes. I was in London on a deal for  
24 Morgan Stanley and I had lunch with  
25 Mr. Iacobescu and we talked about a lot of

1 F. Bartolotta

2 things.

3 I asked him -- I actually asked him  
4 if what was going on with the litigation. He  
5 said it was still ongoing. And that was really  
6 all we talked about at that lunch, other than  
7 the business that I had with Morgan Stanley  
8 which he was involved with.

9 Q. Just to make sure the record is  
10 clear. Do you recall anything else as to what  
11 it was he wanted you to talk to his attorneys  
12 about?

13 A. No. He just asked me to talk to the  
14 attorneys.

15 Q. Okay.

16 MR. ISAKOFF: Let's mark this.

17 (Bartolotta's Exhibit 1, Affidavit  
18 of Frank Bartolotta dated March 27, Bates  
19 Nos. CW75982 to 84, was marked for  
20 identification.)

21 BY MR. MASELLA:

22 Q. Mr. Bartolotta, I'm handing you  
23 what's been marked as Exhibit 1, Bartolotta  
24 Exhibit 1.

25 Is this affidavit that you signed

1 F. Bartolotta

2 this last March 27th?

3 MR. MASELLA: Let me know you're done  
4 looking it over.

5 A. (Document review.)

6 Yes.

7 Q. Okay.

8 Do you recall how much time there was  
9 between when you spoke to Mr. Iacobescu and he  
10 asked you to speak to his lawyers and when you  
11 contacted anybody representing Canary Wharf?

12 A. I'm sorry, I don't remember how long  
13 it was between my conversation, but it would  
14 have been short. Because it was all -- my  
15 visit out there and my signing this was all  
16 within a two-week time frame in March.

17 Q. Okay.

18 Did you place a call to any attorneys  
19 for Canary Wharf?

20 A. Subsequent to my first contact from  
21 the attorneys at Sullivan & Cromwell, yes.

22 Q. Okay.

23 So after you spoke to Mr. Iacobescu  
24 about speaking to his attorneys, who contacted  
25 who?

1 F. Bartolotta

2 A. I believe someone contacted me.

3 Q. Who do you know?

4 A. It was Mr. Shenker and Mr. Tulchin.

5 Q. Okay.

6 And what was said in that  
7 conversation, if you can recall?

8 A. They asked me questions about what  
9 happened during the negotiations and what my  
10 recollection of -- about the negotiations, and  
11 in reference specifically to this document that  
12 was delivered, how that occurred.

13 Q. What do you recall you said in the  
14 conversation?

15 A. I told him that I was negotiating the  
16 document, the lease documents, and I was trying  
17 to avoid delivering this indemnity. And that  
18 it was my understanding that we did not want to  
19 deliver this document and that I couldn't close  
20 the deal without delivering the document.

21 Canary Wharf, their attorneys and  
22 Mr. Iacobescu was insisting that we deliver  
23 this, and I basically booted it back to  
24 New York because I was involved in many, many  
25 other things around the documents and the

1 F. Bartolotta

2 design of the building, and I wasn't successful  
3 in avoiding delivery of the document.

4 Q. Okay.

5 Did you yourself have any role in  
6 negotiating the content of the Surety  
7 Agreement?

8 A. No.

9 Q. Do you know whether there were any  
10 changes to the Surety Agreement -- first of  
11 all, do you know that Canary Wharf drafted the  
12 Surety Agreement?

13 A. Oh, yes.

14 Q. Okay.

15 And do you know whether there were  
16 any changes to that draft between the time it  
17 was first shown to Lehman Brothers Holdings,  
18 Inc. and when it was signed?

19 A. I don't recall.

20 Q. Do you know who it was at Lehman  
21 Brothers Holdings, Inc. that was dealing with  
22 the Surety Agreement?

23 A. I remember the person's position. I  
24 don't remember their name.

25 Q. What was the position?



1 F. Bartolotta

2 A. He was in the Treasury Group.

3 Q. And you didn't recall that person's  
4 name when I asked you about a year ago --

5 A. Right.

6 Q. -- correct?

7 A. Right.

8 Q. Let's make sure I finish the  
9 question.

10 A. Uh-huh.

11 Q. I'm sure you'd like to end it sooner  
12 rather than later. It will be a little easier  
13 if we can speak one at a time.

14 Can you recall anything else about  
15 your conversation that you just talked about  
16 with Mr. Tulchin and Mr. Shenker?

17 A. When we talked over the phone, they  
18 just said they were going to send me a document  
19 that would reflect what our conversations were.

20 And then we had a couple of  
21 conversations about the language that was in  
22 there, that I wanted some changes, and then  
23 they delivered the document.

24 Q. Okay.

25 When you had this first

1 F. Bartolotta

2 conversation --

3 A. Uh-huh.

4 Q. -- had you -- did you have a copy of  
5 the Surety Agreement in front of you?

6 A. No.

7 Q. You eventually got a copy; correct?

8 A. Yes.

9 Q. In this first conversation, was there  
10 any discussion with Mr. Shenker and Mr. Tulchin  
11 about the distinction between a guarantee and  
12 an indemnity under English law?

13 A. Yes. I was told there was a  
14 distinction.

15 Q. And when for the first time did you  
16 learn that there was such a distinction in  
17 English law?

18 A. I had some brief understanding of the  
19 distinction when I had been there on the Morgan  
20 Stanley deal, because an issue came up; but I  
21 did not really fully understand what the  
22 difference was.

23 Q. When you say "there on the Morgan  
24 Stanley deal," what is the time frame for that?

25 A. When I was there in London in March.

1 F. Bartolotta

2 Q. In March of 2014?

3 A. Yes.

4 Q. Okay.

5 Had you had any understanding of the  
6 distinction between a guarantee and an  
7 indemnity under English law prior to that time?

8 A. No.

9 Q. Are you aware of -- well, let me ask  
10 it this way.

11 Was there any other discussion of  
12 English law in the conversation with  
13 Mr. Shenker and Mr. Tulchin the first time  
14 before you saw the Surety Agreement?

15 A. I don't recall if it was before or  
16 after, but there was a brief discussion about  
17 the fact that they were different.

18 Q. A guarantee and an indemnity are  
19 different?

20 A. Yes.

21 Q. Okay.

22 Do you recall what the difference is?

23 A. As I understand it, the indemnity  
24 means that the parent would have backed them up  
25 in any instance, including bankruptcy, and the

1 F. Bartolotta

2 guarantee might not include a backup when the  
3 subsidiary went bankrupt.

4 Q. Okay.

5 Are you aware of the rule in English  
6 law that when a landlord forfeits a lease or  
7 terminates a lease because of the tenant's  
8 default that there can be no damages for lost  
9 future rent against the tenant?

10 A. No.

11 Q. You're not familiar with that rule?

12 A. No. No.

13 Q. Are you familiar with the issues that  
14 are in litigation as between Lehman Brothers  
15 Holdings, Inc. and Canary Wharf at this time?

16 A. No. Other than what I've just said.

17 (Bartolotta's Exhibit 2, EMail from  
18 Mr. Tulchin to Frank Bartolotta, Bates  
19 Stamp Nos. CW75954 to 58, was marked for  
20 identification.)

21 BY MR. ISAKOFF:

22 Q. We have marked as Exhibit 2 --  
23 Exhibit 1 for the record is Bates stamp CW75982  
24 to 84, and this one, No. 2, is CW75954 through  
25 58. And it is an email from Mr. Tulchin to

1 F. Bartolotta

2 you, Mr. Bartolotta, saying, "Frank, As  
3 discussed a few minutes ago, here is Schedule  
4 44," and attaching to it a copy of Schedule 44  
5 to the lease.

6 Do you see that?

7 A. Yes.

8 MR. MASELLA: Now, I don't think the  
9 witness has reviewed the document yet, have  
10 you?

11 THE WITNESS: No.

12 MR. MASELLA: Okay. Take a moment to  
13 review the document and let him know when  
14 you're done.

15 MR. ISAKOFF: Of course.

16 A. (Document Review.)

17 Okay.

18 Q. Do you recall receiving this?

19 A. Yes.

20 Q. And it says on the first page, "As  
21 discussed a few minutes ago."

22 Do you recall whether this was after  
23 only a single conversation you had with  
24 Mr. Tulchin by this time?

25 A. I believe this was after the first

1 F. Bartolotta

2 call, I asked to see the document since I  
3 didn't really recall what was in the document.  
4 And since it seemed to be the point of the  
5 whole litigation, I wanted to just take a look  
6 at it, so I requested it.

7 Q. You referred to this a couple of  
8 times during this deposition as an indemnity.

9 A. Uh-huh.

10 Q. Do you know that it's an indemnity  
11 within the meaning of English law?

12 A. I do not. I only said that because  
13 it says Indemnity.

14 Q. In the title to Section 1 of this?

15 A. Yes.

16 Q. Okay.

17 Do you see that in Section 10, which  
18 is on the last page of this --

19 A. Uh-huh.

20 Q. -- it refers to a guarantor?

21 A. Yes.

22 Q. Okay.

23 Did anybody point out that Section 10  
24 uses the term "guarantor"?

25 A. No.

1 F. Bartolotta

2 Q. And if you look at Section 8, you see  
3 that Section 8 refers to "this guarantee and  
4 indemnity."

5 Did anybody point that out to you?

6 A. No.

7 Q. Do you have a recollection of anybody  
8 back in 2001 referring to this as an indemnity  
9 as distinguished from a guarantee or a surety  
10 agreement?

11 A. No, I don't.

12 Q. Now, how about in 2000?

13 A. No.

14 Q. Did Mr. Iacobescu refer to it as an  
15 indemnity?

16 A. Oh, I don't recall.

17 (Brijesh P. Dave and Richard Katz  
18 enter the deposition proceedings.)

19 BY MR. ISAKOFF:

20 Q. But I assume Mr. Tulchin did?

21 A. Yes.

22 Q. Did anybody discuss with you Section  
23 7? I'm talking about Mr. Tulchin or anybody  
24 from Sullivan & Cromwell discuss with you  
25 Section 7 which provides what happens in the

1 F. Bartolotta

2 event there's a forfeiture of the underlying  
3 lease?

4 A. We didn't even get into the details  
5 of this document. I just asked for this  
6 document to look at it, and it was really more  
7 about what was the language in my affidavit.

8 Q. Okay.

9 Did anyone tell you that in English  
10 law the word "indemnity" has two different  
11 meanings quite different from one another?

12 A. I don't recall having the specific  
13 conversations about the difference. To me, it  
14 was all the same, guarantee, indemnity, it all  
15 means the same thing.

16 Q. Okay.

17 A. I'm not an English lawyer either.

18 Q. I appreciate that, sir.

19 (Bartolotta's Exhibit 3, EMail,  
20 Bates No. CW75959, was marked for  
21 identification.)

22 BY MR. ISAKOFF:

23 Q. Mr. Bartolotta, we've marked as  
24 Exhibit 3, CW75959, and it's just the next item  
25 in the chronology of communications between you



1 F. Bartolotta

2 and Sullivan & Cromwell.

3 Now, this says this is a follow-on to  
4 the last email about -- it looks like about 20  
5 minutes later, asking do you have time for a  
6 quick call.

7 Do you recall having a telephone  
8 conversation?

9 A. Yes. We had several conversations  
10 over the two or three-day period from when they  
11 first contacted me to the time I delivered.

12 Q. Do you happen to remember what the  
13 subject of this was, having just gotten the  
14 Surety Agreement?

15 A. No. We had several quick calls about  
16 the drafts of the document.

17 Q. Okay.

18 (Bartolotta's Exhibit 4, EMail from  
19 Mr. Tulchin, Bates No. CW75960, was  
20 marked for identification.)

21 BY MR. ISAKOFF:

22 Q. We've marked as Exhibit 4, CW75960,  
23 which is Mr. Tulchin's email to you two minutes  
24 after the last exhibit and saying that he'll  
25 call you. I'm just doing this for

1 F. Bartolotta

2 completeness, really, because this doesn't say  
3 much.

4 A. Okay.

5 Q. But do you recall that he then called  
6 you?

7 A. Uh-huh. Yes.

8 Q. Yes. Okay. All right.

9 (Bartolotta's Exhibit 5, EMail from  
10 Mr. Tulchin, Bates No. CW75961 to 64, was  
11 marked for identification.)

12 BY MR. ISAKOFF:

13 Q. For the record, we've just marked  
14 Exhibit 5 which is CW759961 to 64, which is an  
15 email from Mr. Tulchin to you about an hour and  
16 18 minutes after the last one, attaching what  
17 looks like a draft of your affidavit.

18 Why don't you take whatever time you  
19 need to review this and let me know if I've  
20 accurately characterized it.

21 A. (Document Review.)

22 Yes.

23 Q. Okay.

24 Now, you might want to get out  
25 Exhibit 1, which is the final --

1 F. Bartolotta

2 A. Uh-huh.

3 Q. -- because we may want to compare  
4 different portions of this where there were  
5 some changes.

6 Did you actually do any of the  
7 drafting of the affidavit in the sense of doing  
8 the word processing on it, or did you just  
9 comment on drafts that Mr. Tulchin sent you?

10 A. I commented on drafts.

11 Q. Okay.

12 Did you dictate any of the affidavit  
13 to Mr. Tulchin?

14 A. No. I just marked the document for  
15 the revisions that I thought were appropriate,  
16 or I might have even given it to him over the  
17 phone. I don't recall whether I sent anything  
18 or just spoke to him over the phone, but I made  
19 revisions to the draft.

20 Q. Okay.

21 But you didn't draft any of this --

22 A. No.

23 Q. -- in the first instance?

24 A. No.

25 Q. Okay.

1 F. Bartolotta

2 Now, if you'll look at paragraph 3 of  
3 Exhibit 5, it says, the second sentence says,  
4 "During the course of negotiations, I reported  
5 to Mark Marcucci in New York and all points of  
6 a material commercial significance went back to  
7 New York."

8 Have I read it accurately?

9 A. Yes.

10 Q. Okay.

11 And if you'll notice on paragraph 3  
12 of the final takes much of that out.

13 Was that at your request?

14 A. Yes.

15 Q. What was it -- what was the reason  
16 why you asked for that to be changed?

17 A. The reason was that I didn't think my  
18 reporting to Mr. Marcucci was relevant to the  
19 point, because although technically I reported  
20 to him, I reported both locally and to him.  
21 And he didn't have anything specific in terms  
22 of the negotiations of this document and in  
23 many ways didn't really involve himself in the  
24 negotiation of the documents.

25 I would negotiate things, send them

1 F. Bartolotta

2 back, and say this is where I'm going, but most  
3 of the hard business decisions were made  
4 jointly with London and New York.

5 Q. Okay.

6 In the final Exhibit 1, where it  
7 says, "The question of whether Lehman itself,  
8 the parent in New York, would extend an  
9 indemnity went back to Lehman at its  
10 headquarters in New York," was that word  
11 "indemnity" your word or Mr. Tulchin's?

12 A. It was in the draft that was sent to  
13 me and I agreed with it because that's what the  
14 document said.

15 Q. And that that's what the word on the  
16 heading?

17 A. Yes.

18 Q. -- of Section 1 of the --

19 A. Yes.

20 Q. Let me finish my question.

21 That's because the heading of  
22 Section 1 of Schedule I used the word  
23 "indemnity"; correct?

24 A. Correct.

25 Q. And for no other reason; correct?

1 F. Bartolotta

2 A. Correct.

3 MR. MASELLA: Objection.

4 You may answer.

5 BY MR. ISAKOFF:

6 Q. Okay.

7 If you'll turn to the second page of  
8 the draft affidavit that is part of Exhibit 5,  
9 it begins, "I recall the negotiations around  
10 the provisions in the lease dealing with the  
11 indemnity to be given by the parent company,  
12 Lehman."

13 Is the word "indemnity" there used,  
14 so far as you know, for the same reason that it  
15 was in the paragraph we just discussed,  
16 paragraph 3?

17 A. Yes.

18 Q. And that was in the draft as you got  
19 it; correct?

20 A. Yes.

21 Q. And then that sentence continues,  
22 where it says, "The indem -- I recall the  
23 negotiations around the provisions in the lease  
24 dealing with the indemnity to be given by the  
25 parent company, Lehman, because we fought very

1 F. Bartolotta

2 hard for several weeks to limit those  
3 provisions to those of the guarantor under  
4 English law."

5 Do you see that?

6 A. Yes.

7 Q. And in the final, looking at the  
8 beginning of paragraph 5 of Exhibit 1, it says,  
9 "I recall the negotiations around the  
10 provisions in the lease dealing with the  
11 indemnity to be given by the parent company,  
12 Lehman, because we fought very hard to limit  
13 liability to the English subsidiary."

14 A. Uh-huh.

15 Q. Was that change made at your request?

16 A. Yes.

17 Q. Why did you request that change?

18 A. Because I thought the way it was  
19 drafted was leading into the argument of what's  
20 an indemnity or a guarantee. And I wanted to  
21 describe it as I understood it, which is  
22 basically it's a full obligation of the parent  
23 to back up the subsidiary in any event.

24 So I didn't want to get into a legal  
25 argument. I didn't feel I was, you know, I had

1 F. Bartolotta

2 the knowledge to do that.

3 Q. Right.

4 And, in fact, you had no recollection  
5 of there being any fight to limit the  
6 provisions to those of the guarantor under  
7 English law; correct?

8 A. No. I had recollection of their --  
9 of us trying to avoid any liability of the  
10 parent.

11 Q. Right.

12 But you recall the point of  
13 contention being was whether Lehman would sign  
14 the Surety Agreement at all; correct?

15 A. Yes.

16 Q. Okay.

17 And so far as you know, there was no  
18 fight to limit the provisions of that Surety  
19 Agreement to those of the guarantor under  
20 English law?

21 A. The fight was to prevent to limit the  
22 liability to the English subsidiary. Just what  
23 I said.

24 Q. Right.

25 But this sentence that was given to



1 F. Bartolotta

2 you in draft was without basis so far as your  
3 knowledge is concerned; correct?

4 A. No. You're putting words in my  
5 mouth. I said I didn't like the way it was  
6 worded. I changed it to this way because this  
7 was my understanding of what we were trying to  
8 do, was trying to avoid the parent having any  
9 liability.

10 Q. Okay.

11 At this point in your discussions  
12 with Sullivan & Cromwell, you didn't tell them  
13 that Lehman had fought to limit the provisions  
14 to those of the guarantor under English law  
15 because you didn't even know what that meant  
16 back at the time of the negotiations; correct?

17 A. No, I wouldn't have used those words.

18 Q. Okay.

19 Now, paragraph 5 goes on to say after  
20 Canary Wharf's position was immovable, it says,  
21 "George Iacobescu, CEO of Canary Wharf,  
22 insisted on a direct contractual obligation  
23 from Lehman that" --

24 MR. TULCHIN: Can I ask you if you're  
25 reading from the draft or the final --

1 F. Bartolotta

2 MR. ISAKOFF: Draft.

3 MR. TULCHIN: -- because it's not  
4 clear from the record.

5 MR. ISAKOFF: I'm sorry, I'm reading  
6 from paragraph 5 of Exhibit 5. Thank you.

7 BY MR. ISAKOFF:

8 Q. It says, George Iacobescu, CEO of  
9 Canary Wharf, insisted on a direct contractual  
10 obligation from Lehman that could be relied on  
11 whatever happened to LBL and have certainty  
12 that Lehman would be required to pay the rents  
13 and other amounts due regardless of  
14 enforceability against LBL or LBL's condition  
15 or status."

16 Are those words that you used in your  
17 conversations with Mr. Tulchin?

18 A. I don't recall if those were my  
19 direct -- those are my exact words. We had an  
20 open conversation about what was the setting of  
21 what happened. I don't recall if those were my  
22 exact words.

23 Q. Okay.

24 Now, if you look at paragraph 5 in  
25 Exhibit 1, which is the final version, it says,

1 F. Bartolotta

2 "After, however, Canary Wharf's position was  
3 immovable," it says, "George Iacobescu, CEO of  
4 Canary Wharf, insisted on a full indemnity."  
5 Let me just stop there.

6 Do you have a recollection of him  
7 using those words back in 2000 or 2001?

8 A. No. My use of the word is simply  
9 because when I saw the document it said  
10 "indemnity," and so that's what I called it.

11 Q. Okay.

12 Then it adds, "I.e., a direct  
13 contractual obligation from the parent, Lehman,  
14 that could be relied on no matter what happened  
15 to LBL, the English subsidiary."

16 Were those words you used with  
17 Mr. Tulchin?

18 A. Yes. Because that was my  
19 understanding. There was an absolute  
20 obligation of the parent, whether you called it  
21 guarantee or indemnity, that's what it really  
22 was, a direct full obligation of the parent to  
23 back up the subsidiary.

24 Q. Okay.

25 Now, do you know whether, in the

1 F. Bartolotta

2 event a landlord forfeits a lease and the  
3 tenant is no longer obligated to pay rents,  
4 whether the guarantor, a guarantor is obligated  
5 to pay those rents?

6 A. Under --

7 MR. MASELLA: I'm going to object to  
8 the hypothetical.

9 You may answer.

10 A. Under English law?

11 Q. Yes.

12 A. No, I'm not an English lawyer. I  
13 don't.

14 Q. Okay.

15 Now if you'll compare paragraph 6 of  
16 Exhibit 5 with paragraph 6 of Exhibit 1, there  
17 are some figures that appear in the Exhibit 5,  
18 which is the draft, but don't appear in the  
19 final.

20 Was it your idea to take those out?

21 A. Yes.

22 Q. And what was the reason for that?

23 A. Because I couldn't recall the exact  
24 numbers myself. I had a good idea what they  
25 were, but I couldn't recall and I didn't want

1 F. Bartolotta

2 to go back and read the lease documents again  
3 to see if the numbers were accurate.

4 The only one I really remembered was  
5 the rent-free period.

6 Q. There's a sentence at the end of  
7 paragraph 6 in Exhibit 1, the final, which does  
8 not appear at least in those exact words in  
9 Exhibit 5. And they say, "These upfront  
10 payments and obligations assumed by Canary  
11 Wharf appeared to make Canary Wharf even more  
12 determined to obtain the indemnity."

13 First of all, is the word "indemnity"  
14 used there for the same reason it was in  
15 paragraphs --

16 A. Everywhere in this --

17 Q. -- 3 and 5?

18 A. Sorry. Everywhere in this document I  
19 used the word because that's what the document  
20 said. To make it easy to go back and forth.

21 Q. And was this something that you, this  
22 sentence that I just read from Exhibit 1, is  
23 that something that you recall saying to  
24 Mr. Tulchin?

25 A. Yes.

1 F. Bartolotta

2 Q. Okay.

3 So the point being that because  
4 Canary Wharf was making various commitments on  
5 its side, it wanted to get the Surety Agreement  
6 that it had drafted signed by Lehman Brothers  
7 Holdings, Inc.; correct?

8 A. Well, that's not what this sentence  
9 is saying. What this sentence says, okay, is  
10 during the course of the negotiations we were  
11 asking for more and more and more. And my  
12 discussions with George Iacobescu was, it was  
13 getting to the point where we were asking for  
14 much more than we had started with. And he was  
15 becoming more insistent that there was no way  
16 this deal could go through without this  
17 indemnity being delivered because we were  
18 asking for much, much more than we had started  
19 negotiations on.

20 Q. Okay.

21 When you refer to the indemnity,  
22 you're referring to Schedule 4?

23 A. Yes.

24 Q. And so far as you know, there was  
25 nothing about the terms of Schedule 4 that

1 F. Bartolotta  
2 changed during the negotiations, even while  
3 Canary Wharf was making other concessions;  
4 correct?

5 A. I wouldn't know because I wasn't  
6 involved in the negotiation of the document.

7 Q. Okay.

8 (Bartolotta's Exhibit 6, EMail from  
9 Mr. Tulchin, Bates No. CW75965 to 68, was  
10 marked for identification.)

11 BY MR. ISAKOFF:

12 Q. We've marked, Mr. Bartolotta, as  
13 Exhibit 6, CW75965 to 68, which is another  
14 email from Mr. Tulchin to you on March 27th,  
15 which is the day after Exhibit 5 that we just  
16 looked at, attaching a new version of the  
17 affidavit; correct?

18 A. Yes.

19 Q. If you'll turn back to Exhibit 5, I'd  
20 like to compare that with this one, if we  
21 could.

22 Exhibit 5, we already looked at this  
23 language in paragraph 3 which in that draft  
24 says, "During the course of negotiations, I  
25 reported to Mark Marcucci in New York and all

1 F. Bartolotta

2 points of a material commercial significance  
3 went back to Lehman in New York."

4 Do you see that?

5 A. Yes.

6 Q. And then in this version, it says,  
7 "During the course of negotiations Lehman  
8 people in London were involved in the decisions  
9 on most issues but the question of whether  
10 Lehman itself, the parent in New York, would  
11 extend an indemnity went back to Lehman at its  
12 headquarters in New York."

13 MR. MASELLA: I'm sorry, you've lost  
14 me. Which exhibit are we talking about?

15 MR. ISAKOFF: 6.

16 MR. MASELLA: You want to compare 1  
17 and 6 or 1 and 5?

18 MR. ISAKOFF: 5 and 6.

19 MR. MASELLA: 5 and 6.

20 MR. ISAKOFF: I apologize.

21 MR. MASELLA: That's fine. Okay. So  
22 paragraph 3 in 5 and 6.

23 BY MR. ISAKOFF:

24 Q. And the question is, is this a change  
25 that you requested between 5 and 6?



1 F. Bartolotta

2 A. Okay.

3 MR. MASELLA: So take a look at  
4 paragraph 3 in 5 and 6.

5 A. Yes.

6 Q. And why did you request this?

7 A. Simply because it seemed to me that  
8 it made it sound -- the first draft made it  
9 sound like Mark Marcucci was the  
10 decision-maker. And, in reality, he was not  
11 really the decision-maker. It was a  
12 combination of local London people that I  
13 reported to, other people in New York, and  
14 Mr. Marcucci, to my knowledge, had nothing to  
15 do with the document, the negotiation of the  
16 indemnity.

17 (Bartolotta's Exhibit 7, EMail from  
18 Mr. Tulchin, Bates No. CW75969 to 72, was  
19 marked for identification.)

20 BY MR. ISAKOFF:

21 Q. We've marked as Exhibit 7, CW75969 to  
22 72, which is also an email to you from  
23 Mr. Tulchin on March 27 attaching a new version  
24 of the affidavit saying he -- that "I've made  
25 the one change you requested and the final

1 F. Bartolotta

2 version is attached."

3 And the one -- I would just ask you  
4 to compare the very last line of Exhibits 6 and  
5 7.

6 MR. MASELLA: 6 and 7. That's one.

7 THE WITNESS: That's 7.

8 MR. MASELLA: This is 6. So you want  
9 him to compare the last line of 6 and 7;  
10 correct?

11 A. Yes, got it.

12 MR. TULCHIN: The last line of the  
13 last paragraph?

14 MR. ISAKOFF: Yes.

15 MR. MASELLA: The last paragraph or  
16 the last line?

17 MR. ISAKOFF: I'm looking at the last  
18 line of the last paragraph.

19 MR. MASELLA: So this one with this  
20 one.

21 A. Okay.

22 Q. And in 6, it says, "In the end, Mark  
23 Marcucci, the Lehman executive in New York  
24 responsible for this decision, accepted that  
25 position and the lease included the indemnity

1 F. Bartolotta

2 from Lehman that George Iacobescu of Canary  
3 Wharf demanded," and in Exhibit 7 that sentence  
4 is shortened to say, "In the end Lehman  
5 accepted that position and the lease included  
6 the indemnity from Lehman."

7 And I would ask, was that a change  
8 you requested?

9 A. Yes.

10 Q. And what was the reason you requested  
11 the change?

12 A. The same reason I said before in the  
13 other paragraph, and that is that Mark  
14 Marcucci, to my knowledge, was not making the  
15 decision on the delivery of this document.  
16 This was made at a much senior, more senior  
17 level.

18 Q. At Lehman Treasury?

19 A. Yes.

20 Q. Okay.

21 And the term "indemnity" here is the  
22 same as used throughout, is for convenience  
23 because that's what the section heading of  
24 paragraph 1 said?

25 A. Yes.

1 F. Bartolotta

2 Q. I'd ask you to hang on to Exhibit 7  
3 while we look at Exhibit 8.

4 A. Okay.

5 (Bartolotta's Exhibit 8, EMail from  
6 Mr. Tulchin, Bates No. CW75973 to 76, was  
7 marked for identification.)

8 BY MR. ISAKOFF:

9 Q. Marked as Exhibit 8, CW75973 to 76,  
10 another email from Mr. Tulchin to you on  
11 March 27, 2014, attaching another version of  
12 the affidavit.

13 And I would ask you, again, to turn  
14 to the last page of Exhibit 7 and the last page  
15 of Exhibit 8 where the word "absolute" seems to  
16 be substituted for "bullet proof."

17 Was that a change that you requested?

18 A. Yes.

19 Q. Why?

20 A. I just didn't like "bullet proof" in  
21 quotes.

22 Q. Okay.

23 And do you recall whether there were  
24 any further changes after this?

25 A. I don't think so.

1 F. Bartolotta

2 (Bartolotta's Exhibit 9, EMail from  
3 Mr. Tulchin, Bates No. CW75977, was  
4 marked for identification.)

5 BY MR. ISAKOFF:

6 Q. Exhibit 9 is CW75977, which is  
7 another email from Mr. Tulchin to you telling  
8 you who the notary is going to be.

9 Do you see that?

10 A. Yes.

11 Q. And saying that the notary is going  
12 to be there at around 3:00 o'clock that  
13 afternoon, if you look down to the --

14 A. Yes.

15 Q. And did the notary show up then?

16 A. I'm not sure exactly the time, but he  
17 did show up that afternoon, yes.

18 Q. Did you ever find out whether there  
19 was any urgency about your signing this  
20 affidavit?

21 A. No, I didn't ask.

22 Q. Did you ever think about calling  
23 Lehman or any of its representatives before you  
24 signed this?

25 A. No.

1 F. Bartolotta

2 (Bartolotta's Exhibit 10, EMail

3 dated March 27, 2014, Bates No. CW75979,

4 was marked for identification.)

5 BY MR. ISAKOFF:

6 Q. Exhibit 10 is CW75979. It's an email

7 from you to Mr. Iacobescu on March 27, 2014 at

8 3:02 p.m. where you say in the second

9 paragraph, "With regard to the Lehman

10 litigation, I will be signing the affidavit

11 this afternoon and delivering it to S&C."

12 Do you see that?

13 A. Yes.

14 Q. Do you recall how much after this you

15 signed the affidavit?

16 A. No, I don't.

17 Q. Okay.

18 It starts off, it says, "Thanks again

19 for your assistance on the Heintz transaction.

20 It looks like we're done but for the signatures

21 on the document."

22 What was that in reference to?

23 A. Morgan Stanley was selling its

24 building in Canary Wharf to Heintz, and there

25 were two deeds of release that Canary Wharf

1 F. Bartolotta

2 needed to deliver in connection with the  
3 transaction. And we were trying to close very  
4 quickly, and I asked George if he could get his  
5 attorney to act on it quickly as we wanted to  
6 deliver the documents to Heintz in Texas that  
7 day or the day after. And his attorney just  
8 couldn't get a hold of him. So I had called  
9 George and said could you please try and get  
10 your attorney to sign these. They were already  
11 agreed to. It was just a matter of getting  
12 them signed and delivered.

13 Q. Is this the same transaction you were  
14 discussing with Mr. Iacobescu when you first  
15 spoke with him about speaking to Sullivan &  
16 Cromwell lawyers?

17 A. No. They're two different things.  
18 When I went to London, I had lunch  
19 with George, talked to him about the Morgan  
20 Stanley deal. We mentioned the Lehman  
21 litigation, but they were two unrelated,  
22 completely unrelated things.

23 Q. Okay.

24 Last line of this -- actually, before  
25 we get there.

1 F. Bartolotta

2 A. Uh-huh.

3 Q. You say, "Small world. I hadn't  
4 worked with Joe Shenker since 1982 when we did  
5 the first commercial paper financing of real  
6 estate."

7 Had you spoken with Mr. Shenker since  
8 1982?

9 A. I don't think so, no. In fact, I  
10 didn't even remember who he was when he first  
11 called me.

12 Q. Okay.

13 And then the next paragraph says,  
14 "Hopefully, the next time I come to London we  
15 can enjoy some time together with our wives at  
16 Harry's Bar without having to discuss business  
17 issues."

18 A. Yes.

19 Q. Had you met Mr. Iacobescu's wife  
20 before?

21 A. Oh, yes. Yes.

22 Q. On how many occasions?

23 A. Over the -- from 1990 to 2005,  
24 numerous times, you know, we went out socially.

25 Q. Okay.



1 F. Bartolotta

2 So he's a social friend of yours?

3 A. Yes, I would call him a friend.

4 Q. Okay.

5 (Bartolotta's Exhibit 11, Series of  
6 EMail, Bates Nos. CW75980 to 81, was  
7 marked for identification.)

8 BY MR. ISAKOFF:

9 Q. Mr. Bartolotta, Exhibit 11 is CW75980  
10 to 81, which is an email chain also on  
11 March 27th between you and Sullivan & Cromwell  
12 lawyers, including Mr. Tulchin and Mr. Shenker.

13 Have I correctly characterized the  
14 document?

15 A. Yes.

16 Q. Did you ever get together with  
17 Mr. Shenker?

18 A. No.

19 MR. ISAKOFF: All right. Why don't  
20 we take a break?

21 THE WITNESS: Okay.

22 THE VIDEOGRAPHER: The time is 2:52.  
23 We're going off the record.

24 (Recess taken from 2:52 p.m. to  
25 3:09 p.m.)

1 F. Bartolotta

2 THE VIDEOGRAPHER: The time is 3:09.

3 We're back on the record.

4 BY MR. ISAKOFF:

5 Q. Mr. Bartolotta, do you still have  
6 Exhibit 10 in front of you. It's the email  
7 from you to Mr. Iacobescu dated March 27th.

8 MR. MASELLA: There it is.

9 BY MR. ISAKOFF:

10 Q. I know I asked you about this before  
11 the break and I may have misunderstood your  
12 answer. The question I have is, the Heintz  
13 transaction that this refers to, is that  
14 something that you had been talking to  
15 Mr. Iacobescu about in mid March of this year  
16 in London?

17 A. I had spoken to him about it before  
18 that time and then again when I went to London,  
19 I talked to him about it, yes.

20 Q. Okay.

21 Were there any other things connected  
22 to Morgan Stanley that you were talking to  
23 Mr. Iacobescu about in and about March of this  
24 year?

25 A. We talked about things that we did

1 F. Bartolotta

2 together when I was with Morgan Stanley, we  
3 talked about business associates that were  
4 looking for jobs, we talked about a lot of  
5 different things.

6 Q. Is there any connection that you know  
7 of between Morgan Stanley and Canary Wharf in  
8 terms of direct or indirect ownership or board  
9 seats?

10 A. Yes. Morgan Stanley has some  
11 interest in Canary Wharf, and I don't recall  
12 what exactly it was, but there was an interest  
13 in Canary Wharf through Morgan Stanley.

14 Q. Does Morgan Stanley have anybody on  
15 Canary Wharf's board?

16 A. I don't know.

17 Q. Do you know whether Canary Wharf has  
18 any members on the Songbird board?

19 A. I don't know.

20 Q. Okay.

21 Do you know who Songbird is?

22 A. I know the name, yes.

23 Q. Do you know that Songbird has an  
24 ownership interest in Canary Wharf?

25 A. Yes.

1 F. Bartolotta

2 Q. You recall that you and I spoke on  
3 the telephone a few times, a couple of times  
4 last year?

5 A. Yes.

6 Q. Okay.

7 Do you recall telling me that the  
8 word "indemnity" as it relates to the Surety  
9 Agreement didn't ring a bell?

10 A. No, I don't recall that.

11 Q. Are you bearing the costs of your own  
12 counsel here today?

13 A. I signed an engagement letter, yes.  
14 Unless you want to pay for it.

15 Q. I don't think so.

16 MR. MASELLA: We'll take all  
17 reasonable offers.

18 MR. ISAKOFF: Well, I don't have any  
19 further questions at this time.

20

21 EXAMINATION BY MR. TULCHIN:

22 Q. Mr. Bartolotta, hi, I'm David  
23 Tulchin. As you know, I represent Canary Wharf  
24 and I do have some questions for you, if I may.

25 I'm going to ask you first, sir, if

1 F. Bartolotta

2 you would, to please try to find Exhibit 1, the  
3 affidavit that you executed.

4 Do you have that, sir?

5 A. Yes.

6 Q. And could you first look at the third  
7 page of Exhibit No. 1.

8 A. Yes.

9 Q. Do you see a signature there?

10 A. Yes.

11 Q. Above the typed words "Frank  
12 Bartolotta," is that your signature?

13 A. Yes.

14 Q. Did you sign this affidavit in front  
15 of a Notary Public on March 27, 2014?

16 A. Yes.

17 Q. Now, looking at the first page of  
18 Exhibit 1, the first sentence of paragraph 1  
19 starts by saying, "I am a retired nonpracticing  
20 member of the bar of the State of New York."

21 Do you see that, sir?

22 A. Yes.

23 Q. That was true on the day you signed  
24 this?

25 A. Yes.

1 F. Bartolotta

2 Q. It's still true today?

3 A. Yes.

4 Q. When you signed Exhibit 1, your  
5 affidavit, on March 27th, did you appreciate  
6 the significance of swearing to facts in an  
7 affidavit?

8 MR. ISAKOFF: Objection to form.

9 A. Yes.

10 Q. Could you answer, please, sir.

11 A. Yes.

12 Q. Did you understand that the affidavit  
13 might be used in a lawsuit?

14 A. Yes.

15 Q. Did you understand at the time, on  
16 the day you signed this, the importance of  
17 being sure that the facts that you set forth in  
18 the affidavit were correct?

19 A. Yes.

20 MR. ISAKOFF: Objection to form.

21 MR. MASELLA: You may answer.

22 A. Yes.

23 Q. Did you understand at the time you  
24 signed on March 27th that you were sworn to  
25 tell the truth?

1 F. Bartolotta

2 A. Yes.

3 Q. Did you understand that the affidavit  
4 might be used as evidence in a legal  
5 proceeding?

6 A. Yes.

7 Q. At the time you signed on March 27th,  
8 were you confident that everything in this  
9 affidavit is truthful?

10 MR. ISAKOFF: Object to form.

11 MR. MASELLA: You may answer.

12 A. Yes.

13 Q. As of today, May 7, 2014, are you  
14 confident that everything in Exhibit 1 is the  
15 truth?

16 MR. ISAKOFF: Object to form.

17 MR. MASELLA: You may answer.

18 A. Yes.

19 Q. Now, let me ask you -- we'll come  
20 back to Exhibit 1, but I know you have all  
21 these papers in front of you. But if it isn't  
22 too much trouble, can I ask you,  
23 Mr. Bartolotta, to find Exhibit 5.

24 A. Yes.

25 Q. And I think you said during your

1 F. Bartolotta

2 direct examination that this was the first  
3 draft that you received of what became your  
4 affidavit; is that right, the attachment to the  
5 first page of Exhibit 5?

6 MR. MASELLA: So the question is, is  
7 this -- is Exhibit 5 the first draft that  
8 you received. Is that the question, sir?

9 MR. TULCHIN: Yes.

10 A. Yes.

11 Q. All right.

12 Now, on the first page of Exhibit 5,  
13 Mr. Bartolotta, the email starts by saying  
14 this, "Dear Frank, this is what I prepared  
15 based upon our discussion. And then it says,  
16 "You should, of course, feel free to make any  
17 changes. We, of course, want something that is  
18 completely accurate."

19 Do you see that?

20 A. Yes.

21 Q. Did you understand when you received  
22 this on March 26, 2014, that the lawyers from  
23 Sullivan & Cromwell wanted to be sure that any  
24 affidavit that you signed was in your judgment  
25 and based on your recollection, completely



1 F. Bartolotta

2 accurate?

3 MR. ISAKOFF: Objection. Leading and  
4 calls for speculation.

5 MR. MASELLA: You may answer.

6 A. Yes.

7 Q. Now, as far as you know,  
8 Mr. Bartolotta, did this first draft come as a  
9 result of a discussion that you and I had in  
10 which you provided me with your recollection of  
11 the facts?

12 MR. ISAKOFF: I object to the form.

13 MR. MASELLA: You may answer.

14 A. Yes.

15 Q. Was there anything in this first  
16 draft that appeared to you to be some effort by  
17 me or anyone else at the firm of Sullivan &  
18 Cromwell, LLP, to try to put words in your  
19 mouth?

20 MR. ISAKOFF: Objection.

21 MR. MASELLA: You may answer.

22 A. Can you ask that question again --

23 Q. Sure.

24 A. -- because that's making me try to  
25 think of what you were thinking.

1 F. Bartolotta

2 Q. Okay.

3 A. And I don't think I can do that.

4 Q. I understand. Let me go back.

5 When you got this first draft,  
6 Bartolotta Exhibit 5, you under -- sorry,  
7 withdraw that.

8 The first draft, Exhibit 5, came  
9 after you and I had a discussion; correct?

10 A. Yes.

11 Q. And is it true that that discussion  
12 went on for some time?

13 A. Yes.

14 Q. Do you recall that I asked you to  
15 provide me with your recollection of what  
16 happened?

17 A. Yes.

18 Q. Do you recall that in the  
19 conversation you did your best to provide me  
20 with your recollection?

21 A. Yes.

22 Q. When you got this draft, did it  
23 appear to you to come out of left field or did  
24 it appear to be an effort to reflect what you  
25 and I had talked about?

1 F. Bartolotta

2 MR. ISAKOFF: Object to form. It  
3 assumes there is only two possibilities.

4 MR. MASELLA: You may answer.

5 A. It appeared to me to be a reflection  
6 of our discussion.

7 Q. Now, with respect to the drafts that  
8 followed this, did the changes that were made  
9 on the successive drafts, including the changes  
10 that Mr. Isakoff pointed out to you on direct  
11 examination, did those changes get made because  
12 you asked for them to be made?

13 A. Yes.

14 Q. Now, can I ask you, Mr. Bartolotta,  
15 to go back to Exhibit 1. This is the executed  
16 affidavit.

17 And could you look, please, sir, on  
18 the paragraph 5 on the second page. I'm just  
19 going to read it and then I want to ask you  
20 some questions.

21 Paragraph 5 says this, I recall the  
22 negotiations around the provisions in the lease  
23 dealing with the indemnity to be given by the  
24 parent company Lehman because we fought very  
25 hard to limit liability to the English

1 F. Bartolotta

2 subsidiary. However Canary Wharf's position  
3 was immovable. George Iacobescu, CEO of Canary  
4 Wharf, insisted on a full indemnity, i.e., a  
5 direct contractual obligation from the parent,  
6 Lehman, that could be relied on no matter what  
7 happened to LBL (the English subsidiary). He  
8 insisted that Lehman would be required to pay  
9 the rents and other amounts due regardless of  
10 whether LBL remained obligated to pay."

11 Now that's the full paragraph 5;  
12 correct?

13 A. Yes.

14 Q. Can you tell me, sitting here today  
15 May 7, 2014, what you remember about the  
16 negotiations that pertain to what's said in  
17 paragraph 5?

18 MR. ISAKOFF: Objection. Lack of  
19 foundation.

20 MR. MASELLA: You may answer.

21 A. During the negotiations, this  
22 indemnity, as it's called, was on the table and  
23 I objected to it because I did not want to have  
24 the U.S. entity be responsible.

25 Canary Wharf insisted that they would

1 F. Bartolotta

2 not complete the deal without this document.  
3 At that point, because I was working on many  
4 things and was not going to be my decision I  
5 was booted back to New York for consideration  
6 on the premise that Canary Wharf would not  
7 complete the transaction without delivery of  
8 that document.

9 It was then negotiated in New York  
10 and delivered back and slipped into the  
11 documents as is. So that reflects my  
12 understanding, I could not complete the deal  
13 without that document being delivered.

14 Whether the words were changed or  
15 not, I do not know because I did not negotiate  
16 the document, but the document was ultimately  
17 delivered to Canary Wharf's satisfaction and  
18 the deal was completed.

19 Q. Do you recall Mr. Iacobescu -- well,  
20 strike that.

21 Let me start with this. Did you  
22 speak directly to Mr. Iacobescu about this  
23 subject?

24 A. Yes.

25 Q. And you recall those conversations?

1 F. Bartolotta

2 A. Yes.

3 Q. Do you recall Mr. Iacobescu saying to  
4 you, in words or substance, that Canary Wharf  
5 would not do the deal without a direct  
6 contractual obligation from the parent in  
7 New York --

8 A. Yes.

9 MR. ISAKOFF: Wait a minute. Let him  
10 finish the question. Then let me object.

11 BY MR. TULCHIN:

12 Q. -- that could be relied on, no matter  
13 what happened to the English subsidiary?

14 MR. ISAKOFF: I object to the form.

15 MR. MASELLA: You may answer.

16 A. Can you ask the question again  
17 because I lost track when I answered.

18 Q. Sure.

19 Do you recall Mr. Iacobescu in your  
20 conversation saying that Canary Wharf would not  
21 do the deal unless the parent in New York was  
22 on the hook to pay the rent no matter what  
23 happened to the English subsidiary?

24 MR. ISAKOFF: I object to the form.

25 MR. MASELLA: You may answer.

1 F. Bartolotta

2 A. Yes.

3 Q. Do you recall Mr. Iacobescu saying  
4 that Canary Wharf would only do the deal if it  
5 had complete and absolute assurance from the  
6 parent in New York that it would pay no matter  
7 what might become of the sub in England?

8 MR. ISAKOFF: I object to the form.

9 MR. MASELLA: You may answer.

10 A. Yes.

11 Q. What, if anything, do you recall him  
12 saying along those lines?

13 A. You're killing me with this deal. I  
14 can't give you anymore. I have to have a  
15 guarantee from the parent that's absolute and  
16 complete.

17 Q. Do you remember the word "guarantee"  
18 as opposed to "indemnity"?

19 A. You know, to me -- I'm not an English  
20 lawyer to me it means the same thing; all  
21 right? To me, all I know is that the parent  
22 was being asked to back up the subsidiary  
23 whether the subsidiary was paying, in existence  
24 or anything. It was an absolute hell or high  
25 water and, again, I'll say it, guarantee, that

1 F. Bartolotta

2 the parent was going to be there if the  
3 subsidiary was not.

4 Q. Do you recall any discussion between  
5 you and Mr. Iacobescu about whether the parent  
6 had to be obligated even if the sub went  
7 bankrupt?

8 MR. ISAKOFF: I object to the form.

9 Calls for a legal conclusion.

10 MR. MASELLA: You may answer.

11 A. I don't recall specifically that.  
12 What I do recall is that I could not complete  
13 the deal without delivery of this document,  
14 which meant a full backup of the English  
15 subsidiary. I don't remember whether we  
16 actually used the term "bankrupt" or not.

17 Q. When you say "full backup of the  
18 English subsidiary," I think those were your  
19 words a minute ago.

20 A. Right.

21 Q. The full backup was coming from who?

22 A. From LBHI, the parent.

23 Q. The parent in New York?

24 A. Yes.

25 Q. Now, could I ask you to look again at



1 F. Bartolotta

2 paragraph 5 of Exhibit 1. And I want to just  
3 concentrate on the third sentence of the four  
4 sentences in that paragraph. It's the one that  
5 starts, "George Iacobescu, CEO of Canary  
6 Wharf."

7 Do you see that?

8 A. Yes.

9 Q. It goes on to say, "Insisted on a  
10 full indemnity-i.e., a direct contractual  
11 obligation from the parent, Lehman, that could  
12 be relied on no matter what happened to LBL,  
13 the English subsidiary."

14 Do you see that?

15 A. Yes.

16 Q. In the very first conversation that  
17 you and I had, do you recall saying in words or  
18 substance what appears in that sentence?

19 MR. ISAKOFF: Objection. Leading and  
20 vague.

21 MR. MASELLA: You may answer.

22 A. Yes. This reflects the spirit of  
23 what I said. What I said was we could not go  
24 ahead without getting delivery of that  
25 document, and that he expected the parent to be

1 F. Bartolotta

2 able to stand in no matter what happened to the  
3 subsidiary.

4 Q. So in Exhibit 1 when you used the  
5 word "indemnity," and you'll see it in the  
6 sentence we were just looking at the third  
7 sentence of paragraph 5, did you mean that word  
8 "indemnity" to be defined by what follows it  
9 after the dash, i.e., what you say there?

10 MR. ISAKOFF: Objection. Form.

11 Leading -- misleading and mischaracterizes  
12 all of his testimony.

13 MR. MASELLA: You may answer.

14 A. Again, the word "indemnity" I  
15 continued to use because that's what the  
16 document was called. The that is describes to  
17 me what the intent was, that there be a  
18 complete contractual obligation to back up the  
19 subsidiary.

20 Whether you call it indemnity or  
21 guarantee, it didn't matter to me. The concept  
22 is, it's a direct contractual obligation from  
23 the parent that could be relied upon no matter  
24 what happened to the subsidiary.

25 Q. In the first conversation that you

1 F. Bartolotta

2 and I ever had, did you say that to me in words  
3 or substance?

4 MR. ISAKOFF: Objection. Vague.

5 MR. MASELLA: You may answer.

6 A. I don't recall the exact words I used  
7 with you, but I can tell you that I'm clear  
8 that I said that we could not do the deal  
9 without a complete backup from the parent.

10 Q. And that's your recollection of what  
11 Mr. Iacobescu told you in the negotiations; is  
12 that right?

13 A. Yes.

14 MR. ISAKOFF: Objection. Leading.

15 BY MR. TULCHIN:

16 Q. Now, could you look, sir, at  
17 paragraph 7. Again --

18 MR. MASELLA: Did you get his answer?

19 I'm sorry. Go ahead. My apologies.

20 BY MR. TULCHIN:

21 Q. We're looking at paragraph 7 of  
22 Exhibit 1. It starts at the bottom of page 2  
23 and it goes on to the top of page 3.

24 Do you have it, sir?

25 A. Yes.

1 F. Bartolotta

2 Q. And you see the words there, you  
3 start by saying, "It is my distinct  
4 recollection that the position of Canary Wharf  
5 was that Canary Wharf would not do the deal  
6 unless they had complete certainty of income  
7 stream going forward and, thus, that Canary  
8 Wharf required the absolute protection of an  
9 indemnity from Lehman."

10 Do you see that?

11 A. Yes.

12 Q. On March 27, 2014, was it true to say  
13 that you had such a distinct recollection?

14 A. Yes.

15 Q. And who was it from Canary Wharf who  
16 said that to you during the negotiations?

17 A. Mr. Iacobescu and all of his  
18 attorneys.

19 Q. What is your recollection on that  
20 subject today, May 7?

21 A. I'm sorry, I didn't understand the  
22 question.

23 Q. With respect to the sentence in  
24 paragraph 7 that I read you --

25 A. Right.

1 F. Bartolotta

2 Q. -- do you recall this, sitting here  
3 today, that is, do you recall this -- the  
4 position of Canary Wharf was that Canary Wharf  
5 wouldn't do the deal without complete certainty  
6 of income stream?

7 A. Yes, that's what I said.

8 Q. Now, by the way, Mr. Bartolotta,  
9 prior to March 2014, as far as you can recall,  
10 had you and I ever spoken?

11 A. No.

12 Q. Did you sign this affidavit as a  
13 favor in some way to Canary Wharf for George  
14 Iacobescu without regard for the truth?

15 A. I signed it because it was the truth.

16 Q. Was any pressure put on you to sign  
17 something that you believed was not a  
18 hundred percent truthful?

19 A. None.

20 Q. Was any favor offered you if you were  
21 to sign something that Canary Wharf needed and  
22 regardless of its truth?

23 A. No.

24 Q. Did you do this for some quid pro  
25 quo?

1 F. Bartolotta

2 A. No.

3 Q. Why did you sign Exhibit 1?

4 A. Because it was the truth. And you  
5 asked me if I would sign an affidavit to what I  
6 had told you in the conversation, and I said I  
7 would because it's simply the truth.

8 Q. Now, could I ask you, sir, see if you  
9 can find Exhibit 6 which you were shown on  
10 direct.

11 A. Yes.

12 Q. The first page of Exhibit 6 is an  
13 email from me to you on March 27 at 12:04 p.m.

14 Do you see that, sir?

15 A. Yes.

16 Q. And it says, "Frank, Here is the next  
17 draft revised to reflect our discussion this  
18 morning. Please make sure that the facts are  
19 correct, including the new sentence at the very  
20 end of the affidavit. Thanks again, David."

21 Now with respect to each draft that  
22 you got, did you read it carefully?

23 A. Yes.

24 Q. Did you do everything you could to  
25 assure yourself that it said what you wanted it

1 F. Bartolotta

2 to say?

3 A. Yes.

4 Q. Were the changes made changes that  
5 you had requested me to make?

6 A. Yes.

7 Q. Could you look, sir, at Exhibit 3.  
8 This is the email, you were shown this on  
9 direct, there's an email from me to you on  
10 March 26 at 2:47 p.m. And then 18 minutes  
11 later at 3:05, you send me back an email. You  
12 say, "David, Do you have time for a quick call?  
13 Frank."

14 A. Yes.

15 Q. Do you remember whether we had a call  
16 that afternoon?

17 A. Yes.

18 Q. Do you remember --

19 A. It may not have been that afternoon,  
20 but it was -- I think it was. It may have been  
21 that afternoon or the next morning.

22 Q. Do you remember what you said about  
23 Schedule 4 in the conversation that we had?

24 A. No, I don't recall.

25 Q. Do you remember saying to me, either

1 F. Bartolotta

2 in that conversation or beforehand, that it was  
3 your distinct recollection that the parent in  
4 New York had agreed to pay the rent no matter  
5 what might happen to the English subsidiary?

6 MR. ISAKOFF: I object to the form.

7 Leading.

8 MR. MASELLA: You may answer.

9 A. Yes. My understanding was the parent  
10 had agreed to stand behind the English  
11 subsidiary come hell or high water, yes.

12 Q. Could you look, sir, please, at  
13 Bartolotta Exhibit 8.

14 You'll see that there's an email from  
15 me to you on March 29 at 2:29 p.m. and then an  
16 attached draft of an affidavit; right?

17 A. Yes.

18 Q. Okay.

19 And the email starts by saying, "Here  
20 is the new version Frank containing the word  
21 'absolute' instead of 'bullet proof' in the  
22 very last paragraph."

23 Do you have any recollection as to  
24 whose idea it was to change "bullet proof" to  
25 "absolute"?



1 F. Bartolotta

2 A. Yes.

3 Q. Whose was it?

4 A. Mine.

5 Q. When you signed the affidavit,  
6 Exhibit 1, was there anything in there that you  
7 believed was not completely true?

8 A. No.

9 Q. Are you today an employee of Canary  
10 Wharf?

11 A. No.

12 Q. Have you ever worked for Canary  
13 Wharf?

14 A. No.

15 Q. Are you an employee of Morgan  
16 Stanley?

17 A. No.

18 Q. You said earlier you were a  
19 consultant; is that correct?

20 A. Yes.

21 Q. Do you have a consulting agreement  
22 with Morgan Stanley?

23 A. No, I have a consulting agreement  
24 with Pritech, who is an outsourcer for Morgan  
25 Stanley.

1 F. Bartolotta

2 Q. Is there anything about the  
3 consulting agreement or any understanding you  
4 have with anybody that would provide for extra  
5 compensation for you if you were to do  
6 something to help Canary Wharf in this lawsuit?

7 A. No.

8 Q. Did you sign the affidavit,  
9 Exhibit 1, as a way of trying to gain any favor  
10 from Canary Wharf?

11 A. No.

12 Q. With respect to your recollection of  
13 the negotiations that are described in your  
14 affidavit, is there one key thing that stands  
15 out in your mind, even today in 2014, about  
16 what was said by Mr. Iacobescu or anyone else  
17 on behalf of Canary Wharf?

18 A. You'll have to ask that one again.  
19 I'm not sure I follow.

20 Q. Sitting here today in 2014 and  
21 thinking about the negotiations that you  
22 described in your affidavit, is there one key  
23 thing that stands out as being important with  
24 respect to those negotiations?

25 MR. ISAKOFF: I object to the form.

1 F. Bartolotta

2 MR. MASELLA: You may answer.

3 A. I don't understand when you say  
4 what's important. What -- to me, the thing  
5 that I remember the most about the transaction,  
6 as it relates to what we're talking about here,  
7 is that I could not complete the transaction  
8 without signing the document called Indemnity  
9 in the Schedule 4.

10 That's the one thing that really  
11 sticks out, because it was a hard fought  
12 negotiation over an extended period of time and  
13 the document was the last thing that we had to  
14 get through to get the deal complete.

15 And so it stands out to me that we  
16 were -- we were -- the deal was heavily  
17 negotiated and this is last point of the whole  
18 thing was delivering this agreement.

19 Q. And did you understand at the time  
20 that what Lehman would be required to deliver  
21 was this absolute promise from the New York  
22 parent to pay no matter what might happen to  
23 the English subsidiary?

24 MR. ISAKOFF: I object to form and  
25 calls for a legal conclusion.

1 F. Bartolotta

2 MR. MASELLA: You may answer.

3 A. That was my understanding.

4 MR. TULCHIN: Nothing else.

5 MR. ISAKOFF: All right. Let's take  
6 a break and we'll have a few more  
7 questions.

8 MR. MASELLA: We don't need a break.

9 MR. ISAKOFF: I need a break. I need  
10 to consult with my client for a minute.

11 THE VIDEOGRAPHER: The time is 3:39.  
12 We're going off the record.

13 (Recess taken from 3:39 p.m. to  
14 3:45 p.m.)

15 THE VIDEOGRAPHER: The time is 3:45.  
16 We're back on the record.

17

18 EXAMINATION BY MR. ISAKOFF:

19 Q. Mr. Bartolotta, I appreciate you  
20 making yourself available to us for this and I  
21 just have another couple of questions.

22 If you'll look at Exhibit 1, which is  
23 the --

24 A. Yes.

25 Q. -- this is the final of your

1 F. Bartolotta

2 affidavit. And on Mr. Tulchin's examination,  
3 he pointed you to paragraph 7 and he pointed  
4 the words "complete certainty of income stream  
5 going forward."

6 Do you see that?

7 A. Yes.

8 Q. Now, is it your testimony that  
9 Mr. Iacobescu told you that Canary Wharf would  
10 not go forward with the deal unless LBHI,  
11 Lehman Brothers Holdings, Inc., agreed to sign  
12 on the Schedule 4?

13 A. Yes.

14 MR. MASELLA: Objection. Misstates  
15 the testimony.

16 You may answer.

17 A. Yes.

18 Q. And do you have enough expertise in  
19 English law to know whether Schedule 4 provides  
20 for complete certainty of income stream going  
21 forward from LBHI under any and all  
22 circumstances, including where Canary Wharf  
23 terminated the LBL lease and did not serve a  
24 notice under Section 7 of the Surety Agreement  
25 requiring Lehman Brothers Holdings, Inc. to

1 F. Bartolotta

2 accept a substitute lease?

3 A. I'm not an English lawyer. I did not  
4 understand the difference.

5 Q. Okay.

6 So you don't know whether Schedule 4  
7 itself unconditionally provided for complete  
8 certainty of income stream going forward;  
9 correct?

10 A. It was my understanding that's what  
11 it did. I don't know for sure under English  
12 law, but my understanding, that's what that  
13 document accomplished.

14 Q. Okay.

15 But you don't have any independent  
16 expertise of your own?

17 A. No.

18 Q. Okay.

19 And I know that Mr. Tulchin asked you  
20 whether you believed everything that's factual  
21 in the affidavit to be true and you testified  
22 that you thought it was.

23 A. Uh-huh.

24 Q. Are you aware of all of the legal  
25 implications of some of the terms that are

1 F. Bartolotta

2 sprinkled throughout the affidavit, including  
3 the use of the word "indemnity"?

4 A. I used the word "indemnity" because  
5 that's what document was called. My  
6 understanding, I'm not an English lawyer, I  
7 don't know the real difference, I didn't know  
8 the difference at the time, all my  
9 understanding was is that the parent was going  
10 to stand behind the subsidiary in all  
11 instances.

12 Q. Okay.

13 So it's fair to say you think the  
14 document is true -- that the affidavit is true  
15 as a factual matter, but you may not be aware  
16 of all the legal implications of what it  
17 actually says; is that correct?

18 A. Correct.

19 MR. ISAKOFF: Nothing further.

20 MR. TULCHIN: Nothing from me.

21 MR. MASELLA: Just before we go off  
22 the record, the witness would like the  
23 opportunity to review the transcript and  
24 prepare an errata.

25 And thank you very much, everyone,

1 F. Bartolotta

2 for your courtesy here today.

3 THE VIDEOGRAPHER: The time is 3:48.

4 This is the completion of today's  
5 deposition, May 7, 2014.

6 (The deposition was concluded at  
7 3:48 p.m.)

8  
9  
10  
11  
12  
13  
14  
15 \_\_\_\_\_  
16 FRANK BARTOLOTTA

17  
18 Subscribed and sworn to before me  
19 this day of 2014.



1 F. Bartolotta

2  
3 C E R T I F I C A T E  
4

5 STATE OF NEW YORK )

6 ) ss.:

7 COUNTY OF NEW YORK )  
8

9 I, THOMAS A. FERNICOLA, Registered  
10 Reporter and Notary Public within and for  
11 the State of New York, do hereby certify  
12 that the within is a true and accurate  
13 transcript of the proceedings held on May  
14 7, 2014.

15 That I am not related to any of the  
16 parties to this action by blood or  
17 marriage; and that I am in no way  
18 interested in the outcome of this matter.

19 IN WITNESS WHEREOF, I have hereunto  
20 set my hand this 7th day of May, 2014.  
21

22  
23 \_\_\_\_\_  
24 THOMAS A. FERNICOLA, RPR  
25

F. Bartolotta

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F. Bartolotta

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F. Bartolotta

ERRATA SHEET FOR THE TRANSCRIPT OF:

Case Name: In Re: Lehman Brothers

Dep. Date: May 7, 2014

Deponent: FRANK BARTOLOTTA

Reason codes:

1. To clarify the record.

2. To conform to the facts.

3. To correct transcription errors.

Page \_\_\_\_\_ Line \_\_\_\_\_ Reason \_\_\_\_\_

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From \_\_\_\_\_ to \_\_\_\_\_

FRANK BARTOLOTTA

Subscribed and sworn to before me

this \_\_\_\_\_ day of \_\_\_\_\_ 2014.